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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1611

UNITED STATES OF AMERICA

v.

WILLIAM P. CAMPBELL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Counsel for Petitioner

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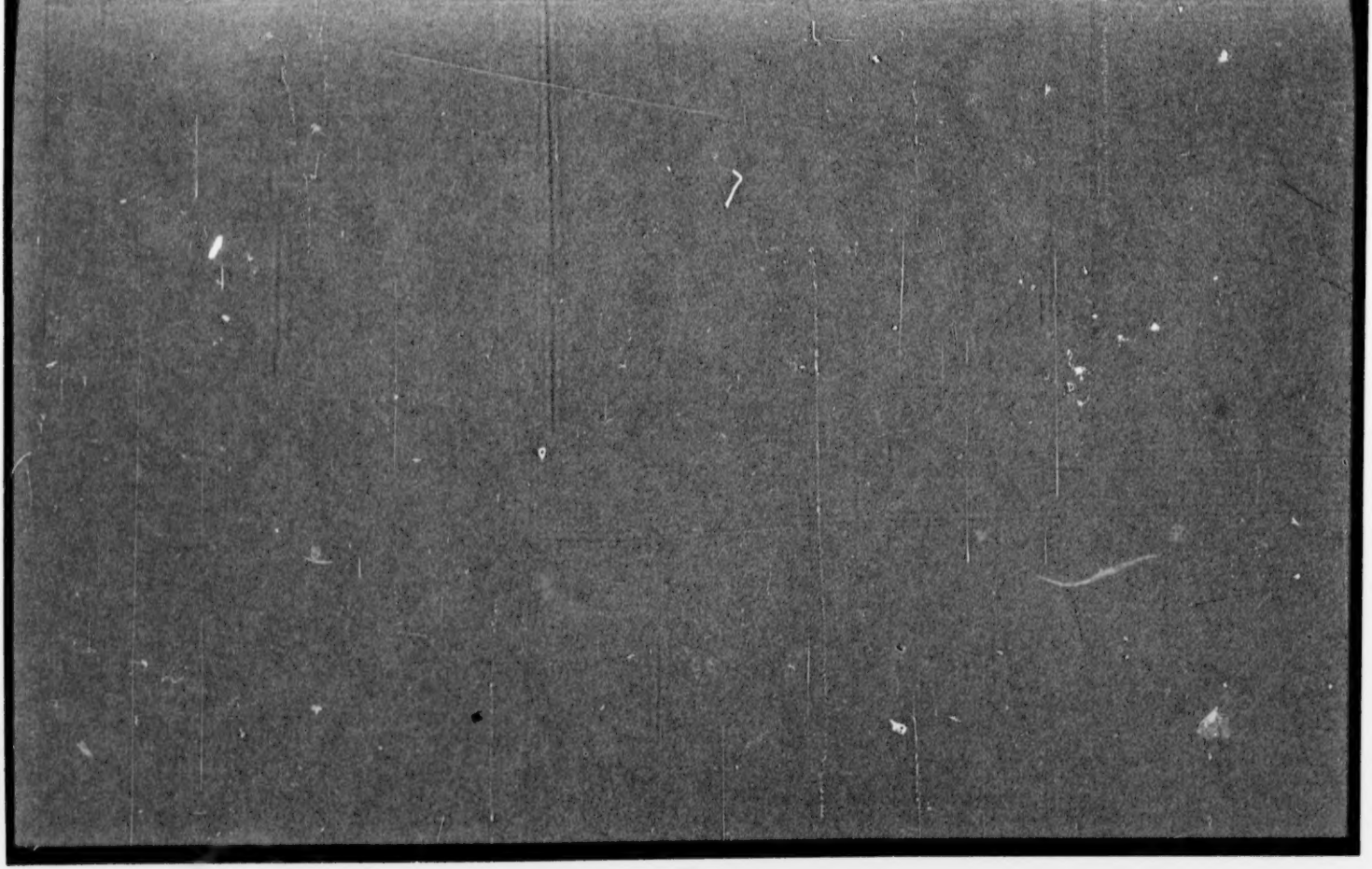

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v.

WILLIAM P. CAMPBELL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of conviction entered in the U. S. District Court for the Eastern District in Alexandria, Virginia.

The petitioner was indicted and convicted on two counts of an indictment charging violation of Title 21 § 841(a) and the second count charging a violation of Title 21 § 846 involving the distribution of one pound of cocaine. The petitioner, age 24, was sentenced by the judge to 8 years in the penitentiary.

JURISDICTION

The U. S. Court of Appeals for the Fourth Circuit in a per curiam order attached to this petition affirmed the conviction on Feb. 25, 1974. Petition for rehearing and/or rehearing en banc was denied April 1, 1974. This judgment being a final judgment of the U. S. Court of Appeals for the Fourth Circuit, jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

Sixth Amendment to the Constitution. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.*

STATEMENT OF THE CASE

The petitioner was indicted in a two-count indictment, the first count charging that on Dec. 14, 1972 the petitioner did knowingly and intentionally distribute 1 lb. of cocaine in violation of Title 21 USC § 841(a). The second count charged a conspiracy on Dec. 13, 1972 up and thru the filing of the indictment to distribute cocaine in violation of Title 21, § 846 of the U. S. Code. The petitioner, a 24 year old youth with no prior record and one year of college had court appointed counsel at his trial. The Government's case consisted almost exclusively of the testimony of a co-conspirator

who asserted that the petitioner had, on the day in question, delivered one pound of cocaine to him.

The Government brought out in their case in chief without objection from Petitioner's court appointed counsel prior narcotic transactions between the petitioner and Munnerlyn. (Tr. 42) The witness testified without objection from the petitioner's counsel as to how on three prior occasions narcotics were sold and what prices were paid (Tr. 43). No objections were made by petitioner's counsel, nor was the attention of the court directed to the fact that the Government was proffering no time reference to these other offenses to the charges in the indictment and no statement was made as to what theory of admissibility the evidence of the other offenses was being offered for by petitioner's court appointed attorney. The trial judge was not directed to the inadmissibility of this testimony, nor was the trial judge advised that even if the testimony were admissible he should weigh whether the probative value of the testimony was outweighed by the prejudice such evidence would have on the charges being tried.

The petitioner's counsel tendered no instructions to the trial judge either at the time the testimony was received, or at the time the jury was instructed as to the limited effect of such testimony and specifically tendered no instructions so that the court could advise the jury that said evidence could only be validly received on the question of motive or state of mind and not to prove separate offenses in and of themselves against petitioner. When petitioner was being cross-examined by the Assistant United States Attorney in response to one of petitioner's answers, the Assistant United States Attorney stated in the presence of the

jury, "I see, very tricky," (Tr. 245). No objection was made by petitioner's counsel; no motion for mistrial was made. When the trial judge instructed the jury he referred at length to the prior sales of narcotics by petitioner. Again no objection was made by petitioner's counsel. No instructions were tendered at all by petitioner setting forth the petitioner's theory of the case.

Petitioner was convicted and sentenced to eight years in the penitentiary.

REASONS WHY THE WRIT SHOULD BE GRANTED

In a trial of a day and a half, the petitioner, a youth with no prior record and court-appointed counsel, was denied effective assistance of counsel by a record which clearly showed that the representation was a formality, and that in every fundamental sense the petitioner did not receive effective assistance of counsel as envisaged by the Sixth Amendment to the Constitution.

ARGUMENT

The petitioner's rights to effective assistance of counsel as guaranteed by the Sixth Amendment to the Constitution were violated and insofar as an adversary proceeding was concerned, the trial was a farce.

In *United States* v. *Wight,* 176 F.2d 376 (2 Cir.) 1946, the Circuit Court of Appeals stated:

> "There can be no quarrel with the proposition that the right to counsel means the right to the conscience service of competent counsel. *VonMolke* v. *Gillies,* 332 U.S. 708, 68 S.Ct. 316, 92 L.ed. 309; *Powell* v. *Alabama,* 287 U.S. 45, 53 S.Ct. 55; *Johnson* v. *Zerbst,* 304 U.S. 458, 58 S.Ct. 1019;

Willis v. *Hunter,* 166 F.2d 721 Mere perfunctory appearance for a defendant is not enough *Powell* v. *Alabama, supra; Avery* v. *Alabama,* 308 U.S. 444, 60 S.Ct. 321; *Johnson* v. *United States,* 71 App. D.C. 400, 100 F.2d 562. *Foley* v. *Ragen* (D.C.), 52 F. Supp. 261; *Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457. *See, Mitchell* v. *United States,* 259 F.2d 787 (D.C.): * * * except that if his conduct is so incompetent as to deprive his client of a trial in any real sense and render the trial a mockery and a farce is one descriptive expression—the accused must have another trial more accurately is still entitled to a trial."

The following cases all support the proposition that on the record in this case petitioner was denied due process of law, and never received a trial that was in conformity with the provisions of the Sixth Amendment. *Scott* v. *United States,* 427 F.2d 609, 138 U.S. App. D.C. 339; *Kruchen* v. *Eyman,* 406 F.2d 304; *Campbell* v. *United States,* 401 F.2d 894; *United States ex rel. Pugach* v. *Mancusi,* 310 F. Supp. 691, *affirmed,* 441 F.2d 1073.

In a trial that lasted a day and a half the Assistant United States Attorney literally rolled over petitioner and his counsel in getting before the jury without limiting instructions of any kind the fact that the petitioner had engaged in other narcotic transactions with the co-conspirator Mumerlyn. The general rule of inadmissibility of other offenses is an ancient one supported by a wealth of federal and state authorities. As the record shows the issue was not even mentioned by petitioner's counsel. *See, Lovely* v. *United States,* 169 F.2d 386; Articles by Professor Stone, 46 Harvard Law Rev. 954; and 51 Harv. Law Rev. 988; *Sutherland* v. *United States,* (4 Cir.) 92 F.2d 305, *Simkins* v.

United States, (4 Cir.) 78 F.2d 594; *Breedin* v. *United States,* (4 Cir.) 73 F.2d 778.

The petitioner's court-appointed counsel not only failed to object to the admissibility of this testimony, and/or to require a proffer as to the time and place of such other offenses, but he failed to tender a limiting instruction to the trial judge at the end of the case so that the jury could be properly advised as to the limited purpose for which this testimony was being received.

In this connection the United States Court of Appeals for the District of Columbia Circuit has ruled in *U. S.* v. *McClain,* 440 F.2d 241, that the failure to *give a limiting instruction is plain error and that the trial judge is under a duty, sua sponte, to give such an* instruction. This was recently reaffirmed in *U. S.* v. *Leonard,* No. 71-1503, decided Jan. 31, 1974, wherein the United States Court of Appeals for the District of Columbia Circuit stated:

> "In this Circuit it has been firmly established that when evidence is admitted for the limited purpose of impeaching a witness, it is plain error in the absence of manifest waiver for the district judge to omit an immediate cautioning instruction. *Jones* v. *U. S.,* 385 F.2d 296 (D.C. Circuit, 1967); *U. S.* v. *Thompson,* 465 F.2d 583 (D. C. Circuit 1972); *U. S.* v. *Bobbitt,* 450 F.2d 685 (D. C. Circuit 1971).

Petitioner's counsel prepared no instructions for the trial judge on this issue, and in fact the trial judge instructed the jury and stated (Tr. 343):

> "he was put under oath, and he told you in his own language his association w/Campbell. He told you the duration of his acquaintance w/Camp-

> bell, the times that he had met him and his previous dealings with him on previous occasions."

No objection was made to this statement of the trial judge and even at this time the trial judge was not requested to define for the jury the limited basis upon which evidence of other offenses had been received against petitioner.

In violation of this court's pronouncement in *Berger* v. *U. S.*, 295 U.S. 78, 55 S.Ct. 78, while appellant was being cross-examined by the Assistant U. S. Attorney, the following occurred (Tr. 245):

> Q. Did you ever take Mr. Munnerlyn w/you when you went to visit Mr. Strachan to get some cocaine?
> A. Yes, one time, not to get cocaine.
> Q. *I see, very tricky.* You took Mr. Munnerlyn to see Mr. Strachan. What was the purpose of that?
> A. I was going over to Bill's house.

Again, no objection was made by petitioner's court appointed counsel, no motion to strike was made, no instruction was tendered to the trial judge requesting him to advise the jury to disregard the statement of the Assistant United States Attorney.

In this connection, also in the closing argument of the Assistant United States Attorney he improperly stated that the co-conspirator Munnerlyn who had testified against petitioner, had been sent to the penitentiary. This was contrary to the record since the co-conspirator was sentenced under the Youth Corrections Act and had been sent to a youth center. Although this was known to the court appointed counsel, this, like

other matters, in this "day and a half trial" also went by in silence.

The trial judge's instructions on reasonable doubt told the jury as follows:

> "It is not required, however, that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reasons and common sense, the kind of a doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs." (Tr. 349)

Court appointed counsel failed to call to the court's attention that such instructions on reasonable doubt has been disapproved, *Scurry* v. *U. S.*, 347 F.2d 468.

In addition to these failures to protect the fundamental rights of petitioner, the Assistant United States Attorney, without objection made arguments to the jury which infringed on appellant's constitutional rights to remain silent (Tr. 19, July 26, 1973), and referred to admissions of petitioner which were not supported in the record (Tr. 23, July 26, 1973).

The Assistant United States Attorney then closed out his argument, again without any objection from petitioner's counsel, and stated to the jury that the testimony of the one witness against the petitioner, the co-conspirator Munnerlyn, was a man of truth who was telling the truth. This was reflected at the record Tr. 23 in his closing argument where the Assistant United States Attorney stated:

> "The man is telling you the truth. I suggest you should believe him."

In line with all the other objectionable matters referred to above, this improper comment by the Assistant United States Attorney went unnoticed by petitioner's court appointed counsel. While it is not the judge's function to intervene to see that petitioner's fundamental rights are protected, the sum total of this day and a half trial shows that from an adversary point of view, the trial was a farce and that the fundamental rights of petitioner were not, either preserved or urged in the trial court. It followed that there was nothing preserved in the record to agree to the United States Court of Appeals for the Fourth Circuit except the Sixth Amendment issue which the Court of Appeals has failed to recognize.

CONCLUSION

The contention that an accused has not received the effective assistance of counsel under the Sixth Amendment should not be lightly made. The record in this case however, shows not that the petition is complaining about mistakes in judgment, oversights that are viewed in hindsight, but has presented a record in which he did not receive the semblance of an adversary proceeding, which this court should not let get by unnoticed.

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Baileys Crossroads, Va. 22041
Counsel for Petitioner

APPENDIX

[Filed in Open Court, May 16, 1973]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No.

UNITED STATES OF AMERICA

v.

WILLIAM F. CAMPBELL

MAY 1973 TERM—At Richmond

THE GRAND JURY CHARGES:

That on or about December 14, 1972 at Falls Church, Virginia in the Eastern District of Virginia, WILLIAM F. CAMPBELL did knowingly, intentionally and unlawfully distribute about one pound of cocaine, a Schedule II narcotic controlled substance.

(Violation of Title 21, United States Code, Section 841 (a)(1))

COUNT II

THE GRAND JURY FURTHER CHARGES:

That from on or about December 13, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of Virginia and elsewhere, WILLIAM F. CAMPBELL, the defendant herein, and Charles Michael Screws and David Alan Munnerlyn, named herein as co-conspirators but not as defendants, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with diverse other persons to the Grand Jury unknown to unlawfully distribute and possess with intent to distribute cocaine, a Schedule II narcotic controlled substance, contrary to Title 21, United States Code, Section 841(a)(1).

OVERT ACTS

At the times hereinafter mentioned the conspirators committed these and other overt acts in furtherance of the conspiracy and to effect the objects thereof:

1. On or about December 14, 1972 at approximately 1:00 P.M. Charles Michael Screws met with Ernest L. Staples at 6371 Lincolnia Road, Alexandria, Virginia in the Eastern District of Virginia.

2. On or about December 14, 1972 in the Eastern District of Virginia at approximately 1:15 P.M. Charles Michael Screws had a telephone conversation with David Alan Munnerlyn.

3. On or about December 14, 1972 at approximately 6:00 P.M. in the Eastern District of Virginia David Alan Munnerlyn had a telephone conversations with WILLIAM F. CAMPBELL.

4. On or about December 14, 1972 in the Eastern District of Virginia at approximately 6:30 P.M. David Alan Munnerlyn met with WILLIAM F. CAMPBELL at the Holiday Inn on Route 50 in Falls Church, Virginia, and received from WILLIAM F. CAMPBELL approximately one pound of cocaine.

5. On or about December 14, 1972 in the Eastern District of Virginia at approximately 7:00 P.M. Charles Michael Screws and David Alan Munnerlyn met with Ernest L. Staples and John W. Sauer at 6371 Lincolnia Road, Alexandria, Virginia and delivered to Ernest L. Staples and John W. Sauer approximately one pound of cocaine.

(Violation of Title 21, United States Code, Section 846.)

A TRUE BILL:

/s/ JOHN B. NEAL, III
Foreman

BRIAN P. GETTINGS
United States Attorney

By: /s/ K. GREGORY HAYNES
K. Gregory Haynes
Assistant United States Attorney

Indictment and Commitment

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 152-73-A

UNITED STATES OF AMERICA

v.

WILLIAM F. CAMPBELL

On this 17th day of August, 1973 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Unlawful distribution of cocaine—T21 USC 841 (a)(1)—count 1 and Conspiracy—T21 USC 846—count 2 as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on count 1, five (5) years on count 2 to run concurrently with count 1 provided the defendant shall become eligible for parole after two (2) years pursuant to T18 USC 4208(a)(1).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ OREN R. LEWIS
United States District Judge.

W. FARLEY POWERS, JR.
Clerk.

A True Copy, Teste:

W. FARLEY POWERS, JR., *Clerk*

By /s/ (Illegible)
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2178

UNITED STATES OF AMERICA, *Appellee*,

v.

WILLIAM F. CAMPBELL, *Appellant*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued February 6, 1974 Decided February 25, 1974

Before WINTER, BUTZNER and WIDENER, Circuit Judges.

Albert J. Ahern, Jr., for Appellant; Stephen R. Pickard, Special Assistant to the United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

PER CURIAM:

After examination of the record and the briefs, and hearing oral argument, we perceive no reversible error.

Affirmed.

[Filed April 1, 1974]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2178

UNITED STATES OF AMERICA, *Appellee,*

v.

WILLIAM F. CAMPBELL, *Appellant.*

Order

The petition for rehearing of William F. Campbell, containing a suggestion for rehearing in banc, has been read and considered. No poll has been requested on the suggestion for rehearing in banc by a judge eligible to make the request.

It is, with the concurrence of Judge Butzner and Judge Widener, ORDERED that said petition be, and it is hereby, denied.

For the Court:

/s/ HARRISON L. WINTER
Harrison L. Winter
United States Circuit Judge

A True Copy, Teste:

WILLIAM K. SLATE, II, *Clerk*

By /s/ SHARON GRUBB
Deputy Clerk